United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-1251

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P/S

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FOR THE SECOND CIRCUIT

REA EXPRESS, INC.

Petitioner,

v.

CIVIL AERONAUTICS BOARD

Docket No. 74-1251

Respondent,

and

AIR EXPRESS INTERNATIONAL CORPORATION

Intervenor.

BRIEF OF INTERVENOR

AIR EXPRESS INTERNATIONAL CORPORATION

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STATEMENT OF ISSUES

1. Is the jurisdiction of the Civil Aeronautics Board to investigate trade practices under section 411 of the Federal Aviation Act discretionary?

2. May the Civil Aeronautics Board refuse to institute an investigation of alleged public confusion resulting from the similarity of names of indirect air carriers when it determines that such investigation is not in the public interest?

3. Was the decision of the Civil Aeronautics Board refusing to institute an investigation of alleged public confusion resulting from similarity of names of indirect air carriers an arbitrary exercise of its discretion?

STATEMENT OF THE CASE

Intervenor, Air Express International Corporation, and its predecessor corporations, pursuant to authorization by the Civil Aeronautics Board, have provided domestic and international air freight forwarding services to the public for over 35 years.

Air Express International Corp., intervenor's predecessor, was formed and began air freight operations in 1935. It and a related company, Air Express International Agency, Inc., were among the companies originally authorized by the Civil Aeronautics Board to perform air freight forwarding services. Air Freight Forwarder Case, 9 C.A.B. 473 (1948); Air Freight Forwarder Case (International), 11 C.A.B. 182 (1950). Since that time intervenor has continuously conducted air freight forwarding services using the name Air Express International. (13(a)).

In 1970, following Board approval (Order 70-1-4, Jan. 2, 1970), Air Express International Corp. was merged with Wings and Wheels Express Inc. Thereafter the company's domestic operations were conducted under the name Wings and Wheels. However, pursuant to Board authorization, the company continued to conduct its international operations under the name, Air Express International, (11(a), 62(a)n. 1).

Following internal reorganization in 1972 the company moved to consolidate all its operations under the name Air Express International. Its corporate charter has been amended to change its name to Air Express International Corporation. In response to the application filed by intervenor in Docket 24532 and after investigation pursuant to Part 215 of the Board's Economic Regulations, Interstate Air Freight Forwarder Operating Authorization No. 32 and International Air Freight Forwarder Operating Authorization No 412 were reissued by the Board to intervenor in the name of Air Express International Corporation. Thus beginning in 1948 and extending to the present day intervenor has had continuous authorization from the Board to conduct air freight forwarding operations under the name Air Express International.

By complaint filed with the Board on October 6, 1972, Petitioner REA Express, Inc. (REA) requested the Board to order intervenor to cease and desist from using the trade name Air Express International in its international air freight forwarding operations. Petitioner's basic allegation was that use of the name Air Express International by [intervenor] is inherently likely to confuse Air Express customers of REA and make them believe that [intervenor's] services are really those of REA. (3(a)-4(a))

By letter dated June 8, 1973, the Director of the Bureau of Enforcement declared that it would not be in the public interest to institute an enforcement proceeding upon the allegations set forth in REA's complaint. (23(a)) The Director's decision was based on the fact that the Board had previously screened respondent's name for the existence of such an inherently confusing name situation when they were presented to the Board for issuance of operating authority and had found none to exist. (29(a)) Further, the Director reasoned that if the names were inherently confusing that fact would have manifested itself in instances of actual confusion during the more than 25 years that the names had been in use. Therefore, since no allegations of actual confusion were presented, the Director concluded that REA's complaint failed to present a prima facie case involving a substantial danger of public confusion. (30(a) - 31(a))

Thereafter, REA filed a Motion to Review the Director's determination and to amend its complaint nunc pro tunc to allege actual confusion resulting from use of the names. (36(a)) On August 28, 1973, the Board issued Order 73-8-134 which affirmed the decision of the Director of the Bureau of Enforcement and ordered the complaint dismissed. (68(a)) For purpose of review the Board treated REA's complaint as having been amended and considered the additional material submitted with the Motion. (63(a) n. 4)

The Board's decision was based on its finding that it would not be in the public interest to institute an investigative proceeding since there were no grounds for believing that intervenor's use of the words "air express" in its name had resulted in specific and substantial public confusion. (64(a))

A subsequent Petition for Reconsideration filed by REA was denied by the Board by Order 73-12-102, dated December 26, 1973. This Petition followed:

ARGUMENT

I. THE ASSUMPTION OF JURISDICTION BY THE CIVIL AERONAUTICS BOARD TO INVESTIGATE TRADE PRACTICES UNDER SECTION 411 OF THE FEDERAL AVIATION ACT IS DISCRETIONARY.

The authority of the Civil Aeronautics Board to investigate charges of unfair or deceptive methods of competition among air carriers subject to its jurisdiction is contained in Section 411 of the Federal Aviation Act. That section states that:

> The Board may, upon its own initiative or upon complaint by any air carrier, . . . if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. 49 U.S.C. §1381 (emphasis added)

The words of the Act make it clear that the Board has discretion to decline to institute an investigation into methods of competition requested in a third-party complaint. This section vests even broader

discretion with the Board than it has in the exercise of its general investigatory power. The general investigatory authority of the Board, as set out in Section 1002 of the Act, requires that if:

> there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Board to investigate the matters complained of. Whenever the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. 49 U.S.C. §1482.

This language has been definitively interpreted as a grant of discretionary enforcement authority. Transcontinental Bus System, Inc., v. CAB, 383 F. 2d 466, 478 (5th Cir. 1967); Flying Tiger Line, Inc., v. CAB, 350 F. 2d 462, 465 (D.C. Cir. 1965); 1 K.C. Davis, ADMINISTRATIVE LAW TREATISE, §4.07 at 260 (1958). See also Pan American World Airways, Inc. v. CAB, 392 F. 2d 483, 495 n. 22 (D.C. Cir. 1968). It has further been held that the Board has the discretionary power to dismiss a complaint without a hearing even if the complaint sets forth reasonable grounds for believing that the Act has been violated. Flight Engineers' International Association v. CAB, 332 F. 2d 312, 314 (D.C. Cir. 1964). It clearly follows from these decisions that the more permissive language of Section 411 which empowers the Board to institute investigations of unfair trade practices constitutes a grant of wholly discretionary jurisdiction.

Furthermore, Section 411 was modeled after, and its language is similar to, Section 5 of the Federal Trade Commission Act.

American Airlines v. North American Airlines, 351 U.S. 79, 82 (1956). Under Section 5, the Commission has jurisdiction to institute proceedings to determine if any person has engaged in unfair trade practices "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." 15 U.S.C. §45(b). By virtue of this language, it has been held that FTC jurisdiction is wholly discretionary. FTC v. Klesner, 280 U.S. 19 (1929); 1 K.C. Davis, ADMINISTRATIVE LAW TREATISE, §4.07 at 259 (1958). It, thus, follows that the similar language of Section 411 confers similar discretionary jurisdiction on the Board.

II. THE BOARD MAY REFUSE TO INSTITUTE AN INVESTIGATION OF ALLEGED PUBLIC CONFUSION RESULTING FROM THE SIMILARITY OF NAMES OF INDIRECT AIR CARRIERS WHEN IT DETERMINES THAT SUCH INVESTIGATION IS NOT IN THE PUBLIC INTEREST.

The complaint filed with the Board in this case alleged that the use of the term "air express" by intervenor in its corporate and trade name constituted an unfair or deceptive trade practice. The Board has authority to consider such allegations under Section 411 of the Act. But by the terms of the Act itself such proceedings are warranted only if the Board "considers that such action by it would be in the interest of the public . . ." 49 U.S.C. §1381. Thus the determination by the Board of whether an investigation would be in the public interest is a prerequisite to its assumption of jurisdiction.

As stated by the Supreme Court:

> It should be noted at the outset that a finding as to the "interest of the public" under both §411 and §5 is not a prerequisite to the issuance of a cease and desist order as such. Rather, consideration of the public interest is made a condition upon the assumption of jurisdiction by the agency to investigate trade practices and methods of competition and determine whether or not they are unfair. American Airlines v. North American Airlines, 351 U.S. 79, 83 (1956) (emphasis added)

Furthermore, the public interest sufficient to justify assumption of jurisdiction must be "specific and substantial". American Airlines, 351 U.S. at 83.

In further delineating the Board's responsibility to determine the public interest, the Court stated:

> Under §411, it is the Board that speaks in the public interest. We do not sit to determine independently what is the public interest in matters of this kind, committed as they are to the judgement of the Board. American Airlines, 351 U.S. at 85.

The Board's decision to dismiss the complaint in this case was based precisely on this standard. (64(a)) That is, the Board determined that under the circumstances it would "not be in the interest of the public to institute a proceeding under Section 411." (68(a)) Thus, the Board has exercised the discretion conferred on it to determine the public interest prerequisite to exercise of its jurisdiction, and its decision cannot be reversed absent a showing of abuse of discretion. U.S. Lines Co. v. CAB, 165 F.2d 849 (2d. Cir. 1948).

III. THE DECISION OF THE BOARD NOT TO INSTITUTE AN INVESTIGATION OF ALLEGED PUBLIC CONFUSION RESULTING FROM SIMILARITY OF NAMES OF INDIRECT AIR CARRIERS WAS NOT AN ABUSE OF DISCRETION.

The decision of the Board to dismiss REA's complaints must be affirmed unless it is shown to be an arbitrary exercise of its discretion. Flying Tiger Line, Inc. v. CAB, 350 F. 2d 462 (D. C. Cir. 1965); U. S. Lines, Co. v. CAB, 165 F. 2d 849 (2d. Cir. 1948). Under the narrow scope of review mandated by this standard the Board's determination should not be disturbed if it has warrant in the record and a rational basis in law. American Cyanamid Co. v. FTC, 363 F. 2d 757 (6th Cir. 1966) American Airlines v. CAB 231 F. 2d 483, 486 (D. C. Cir. 1956).

The duty imposed on the Board by section 411 of the Act is to investigate allegations of unfair methods of competition among air carriers within its jurisdiction if it determines it is in the public interest to do so. The public interest which will justify such a proceeding must be "specific and substantial". American Airlines v. North American Airlines, 351 U. S. 79 (1956). In a case asserting name confusion there must be a basis for finding that substantial confusion exists among the public using the air carrier's services before the Board is justified in assuming jurisdiction. The mere protection of the private rights of the individual carriers is not a sufficient public interest basis upon which to institute a proceeding. Substantial public

confusion has been defined as that which is frequent, common, persisting over a considerable period of time and not sporadic, isolated or de minimis. North American Airlines, Section 411 Proceeding, 18 C.A.B. 96 (1953); Air America Inc., Section 411 Proceeding, 18 C.A.B. 810 (1954); Trans International Airlines, Inc. v. Texas International Airlines, Inc., CAB Order 73-3-103, Docket 20875, March 27, 1973.

On the basis of the record before it and considering the operational history of the parties involved there was clearly a rational basis for the Board's decision.

The lengthy history of intervenor's use of the term "air express" in its corporate and trade names is of particular significance. As stated in the Board's decision:

> Moreover, there is no blinking the fact that [intervenor's] predecessors have been operating under names which include the words "air express" since before the Civil Aeronautics Act became law in 1938, and they were among the first forwarders to receive authorization from the Board 25 years ago . . . The absence of any complaint or other manifestation of significant public confusion during those years suggests that there is little reason to believe that there has been such confusion as would warrant institution of a proceeding looking to an order requiring the respondents to discontinue use of their names. (65(a))

Furthermore, under Part 215 of its Regulations the Board will allow an air carrier to operate under a certain name only if it finds that

the use of such name is not "contrary to the public interest." Thus the Board has screened the name of the parties for the existence of an inherently confusing name situation when they were presented to the Board for operating authority and has found none to exist. (29(a)) Therefore, based on the inference of consistency with the public interest raised by the Board's prior authorization to intervenor to use the name Air Express International and the continual use of that name for over 35 years without complaint of public confusion, the Board was clearly warranted in concluding that it was not in the public interest to institute an investigation based on REA's complaint.

CONCLUSION

The decision of the Board has warrant in the record and a rational basis in law; it is therefore a reasonable exercise of its discretion and should be affirmed.

Respectfully submitted,

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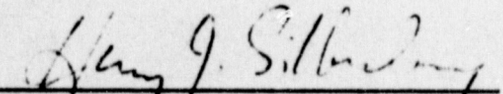
By: 

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CERTIFICATE OF SERVICE

I certify that the Brief of Intervenor Air Express International Corporation, was served upon counsel for the other parties by mailing on July 15, 1974, postpaid, two copies thereof to each of the following:

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